No. _____

IN THE
Supreme Court of the United States

SAMACA, LLC,

Petitioner,

v.

CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC. AND CELL PHONE MANIA, LLC,

Respondents.

On Petition for Writ of Certiorari to the Georgia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

DAVID R. MARTIN
D.R. MARTIN, LLC
5200 PEACHTREE RD., Ste 3116
Atlanta, GA 30341
Tel. – (770) 454-1999
Cell – (404) 822-3563
E-mail: dmartin@abogar.com
Counsel for petitioner

QUESTION PRESENTED

Is Georgia's remedy for abusive litigation under O.C.G.A. § 9-15-14 exempt from arbitration under the Federal Arbitration Act ?

CORPORATE DISCLOSURE STATEMENT

Petitioner Samaca, LLC is a private company owned by Arnaldo González and Carolina Troccola Ballester, a married couple. Petitioner has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Samaca I:
Samaca LLC v. Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC.

Trial court: Superior Court of Fulton County, Georgia, Case No. 2016 CV 276036 (Feb. 7, 2017) (final dismissal order)…….App.1a-8a.

Georgia Court of Appeals: *affirmed* 813 S.E.2d 416 (2018) (physical precedent only) ...App.9a-19a.

Georgia Supreme Court: *cert. denied* Case No. S18C1072 (Oct. 22, 2018) *reconsideration denied,* (Nov. 15, 2018).....App.20, 21a.

Samaca II:
Samaca LLC v. Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC.

Trial court: Superior Court of Fulton County, Georgia, Case No. 2016 CV 276036 (March 6, 2019) (post-judgment final order)…….App.30a.

Georgia Court of Appeals: *application for review denied* Case No. A19D0372 (April 2, 2019) ……..App.39a

Georgia Supreme Court: *cert. denied* Case No. S19C1106 (Dec. 23, 2019) *reconsideration denied* (Ga. Jan. 27, 2020). …….App.40a,41a.

Samaca III:
Samaca LLC v. Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC.

Trial Court: Superior Court of Fulton County, Georgia. Case No. 2016 CV 276036 (June 4, 2019) (post-judgment final order)……App.42a-44a.

Georgia Court of Appeals*:* *application for review denied* Case No. A19D0539 (July 23, 2019) App.45a; *reconsideration denied* (Ga.App. Aug. 7 and 29, 2019) ……App.45a-48a.

Georgia Supreme Court: *cert. denied* Case No. S20C0114 (Dec. 23, 2019) *reconsideration denied* (Ga. Jan. 27, 2020)…….. App.49a,50a.

The only published order in these related cases occurred in ***Samaca, I,*** 813 S.E.2d 416 (2018). App.9a-19a. All other orders and judgments are unpublished.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

REGULATIONS

CONSTITUTIONAL PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Samaca, LLC respectfully petitions for the writ of certiorari to Georgia Court of Appeals concerning two related final judgments on the merits arising from the same case.

JUDGMENTS AND ORDERS BELOW

The two related judgments by the Georgia Court of Appeals in *Samaca II*, App.39a, and *Samaca III*, App.45a-48a, were subjects of petitions for certiorari that were both denied by the Georgia Supreme Court on December 23, 2019. App.40a,49a, The Georgia Supreme Court later denied motions for reconsideration in both cases on January 27, 2020. App.41a,50a.

JURISDICTION

Under U.S. Supreme Court Rule 13.3, petitioner timely filed this petition within 90 days of the orders by the Georgia Supreme Court denying motions for reconsideration on January 27, 2019 in *Samaca II* and *Samaca III*. App.41a,50a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND OTHER PROVISIONS

Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy

> thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Relevant provisions of the Official Code of Georgia ("**O.C.G.A**.") are reprinted at App.245a-257a.

Relevant rules of the Georgia Court of Appeals (**Ga. App. Rule**) and the Georgia Supreme Court (**Ga. Rule**) are reprinted at App.257a-265a.

A relevant excerpt of the **Georgia Judicial Code of Conduct, Canon 2, Rule 2.11, Comment [2]** is reprinted at App.265a-266a.

INTRODUCTION

This case is about the judicially decreed exemption of a state law claim from arbitration under the Federal Arbitration Act ("FAA").[1] Not only is this barred by the FAA, but no court possessed power in this case to even rule on this question.

In *Samaca I*, respondents Cellairis Franchise, Inc. and Global Cellular, Inc. (collectively "Cellairis") persuaded a Georgia trial court that, despite conflicting forum selection and arbitration

[1] 9 U.S.C. §§ 1 et seq.

provisions, litigation must take a back seat to arbitration. Citing a so-called "delegation provision," the judge compelled all of petitioner's claims to arbitration on the question of arbitrability and dismissed its suit. App.1a,3a,7a. Petitioner appealed but lost in a non-unanimous decision. App.9a,18a-19a. Petitioner accepted the result: The parties must first arbitrate the arbitrability of *all* claims.

Or so petitioner thought.

After securing the order in *Samaca I*, Cellairis filed *Samaca II*, which asserted post-judgment claims against petitioner for fees and expenses. Oddly, the first was a "prevailing party" claim under the *same* contracts whose arbitrability and validity were being challenged in *Samaca I*. The second was a claim based on O.C.G.A. § 9-15-14, a Georgia statute for abusive litigation. Confoundingly, Cellairis argued that, despite the conflicting forum selection clause, Samaca had had no basis to contest the existence of an agreement to arbitrate arbitrability. App.63a-64a. Preceding merits defenses, petitioner raised judicial estoppel: An arbitrator must also decide the arbitrability of Cellairis's own claims, including the 9-15-14 claim. App.79a,88a-89a. To be sure, obeying the final determination in *Samaca I*, petitioner said the same about its *own* post-judgment 9-15-14 claim against Cellairis in *Samaca III*. App.205a-206a.

Nevertheless, the judge compelled arbitration of Cellairis's contract claim *on the merits*, not arbitrability. App.34a-35a. Next, the judge held that "awards under 9-15-14 are not 'claims' subject to

arbitration but rather constitute sanctions of the Court." App.38a. Holding that petitioner had "lacked substantial justification" under 9-15-14(b) to dispute the existence of an agreement to arbitrate arbitrability, the judge then awarded almost $60,000 to Cellairis. App.37a.

Later, over Samaca's objections, the court without a hearing denied on the merits Samaca's own 9-15-14 claim against Cellairis in *Samaca III*. App.42a-44a.

The judge's decisions in Samaca *II* and *III* conflict with *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) because state law may not exempt specific claims from arbitration under the FAA. They also conflict with *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019) because a court in this case lacks power to even decide the arbitrability of 9-15-14 or any other claim.

Samaca tried to persuade two higher Georgia courts that the judge's rulings in *Samaca II* and *III* are void for lack of power to make them. However, the Georgia Court of Appeals (where the trial judge's son works) refused Samaca's applications for direct *de novo* appeals. App.153a,158a,208a-211a. Instead, using 30-day "quick-look" procedures, the Georgia Court of Appeals without explanation denied the applications as "discretionary" *on the merits*. App.39a,45a-48a. Yet courts have no discretion to enforce arbitration agreements under the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). And although the Georgia Supreme Court had said that a party is "entitled to a direct appeal" from orders denying enforcement of arbitration

agreements under the FAA, it did not question the Georgia Court of Appeals and turned away Samaca's certiorari petitions. App.40a-41a,49a-50a.

STATEMENT OF THE CASE

I. *Samaca I: Samaca loses forum dispute; judge compels arbitration of Samaca's claims on arbitrability questions.*

On June 3, 2016, petitioner sued Cellairis and Cell Phone Mania, LLC[2] in a Georgia state court.[3] The suit concerned Samaca's attempted purchase of a cell phone repair franchise in a Florida mall. Samaca took possession of franchise spaces. However, weeks later, Samaca was forced to leave the premises because Cellairis had not secured the required occupancy rights. Samaca claimed that the parties did not conclude a valid contract and pled rescission, fraud, and statutory claims. App.51a-53a.

Samaca's original Georgia complaint invoked a forum selection clause as a "separate and severable provision." App.53a n.1. Under Georgia law, a forum selection clause is treated as a "distinct contract," separate from any other obligations. *Equity Trust Co. v. Jones*, 792 S.E.2d 458, 460 (Ga. App. 2016). This

---

[2] Cell Phone Mania, LLC did not answer Samaca's complaint in Georgia, suffered default judgment, and did not participate in these proceedings. App.154a & n.1.

[3] Samaca voluntarily dismissed an initial suit in Florida; it then brought the Georgia case with different counsel. App.14a.

clause was in a document called the "Assignment and Assumption Agreement" (the "AA Agreement"). Written by Cellairis with an effective date of September 1, 2014, the AA Agreement was between *all* four parties in this case.[4] Pursuant to the AA Agreement, Samaca paid Cellairis $350,000 for the franchise rights. The forum selection clause made the Georgia trial court "the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate *any case or controversy arising either, directly or indirectly, under or in connection with this Agreement*[.]" App.4a,53a,55a-56a.(Emphasis added)

On August 5, 2016, Cellairis moved to compel arbitration. It pointed to arbitration clauses in pre-printed documents called the "Franchise Agreements" and "Sub-License Agreements" with an effective date of June 30, 2014. Cellairis also pointed to incomplete, unsigned, undated form versions of these documents incorporated by reference in the AA Agreement. Regarding Cellairis Franchise, Inc. and Samaca, the arbitration clauses in the "Franchise Agreements" covered "all controversies, claims, or disputes […] *including whether any specific claim is subject to arbitration at all (arbitrability questions)*[.]" App.2a-3a.[5] (Emphasis added).

---

[4] On September 2, 2016, Samaca amended the complaint to show that the forum selection clause also bound Global Cellular, Inc. App.58a-59a.

[5] Regarding Global Cellular, Inc. and Samaca, the arbitration clauses in the "Sub-License Agreements" are mirror images of those in the "Franchise Agreements." App.3a.

After a case transfer from the initial judge whose judicial campaign treasurer was Cellairis's general counsel,[6] the new judge, Hon. Alice D. Bonner, granted Cellairis's motion without a hearing 49 days later on February 7, 2019. Shunning the forum selection clause, Judge Bonner cited the "Delegation Provision" that provided for arbitration as to "whether any specific claim is subject to arbitration at all (arbitrability questions)" and dismissed Samaca's suit. App.3a,7a. Samaca appealed to the Georgia Court of Appeals in *Samaca I*. App.9a-19a.

II. *Samaca II.*

A. Cellairis makes two post-judgment claims against Samaca.

While the appeal was pending, Cellairis's arbitration march balked. Cellairis filed *Samaca II*, a motion in the trial court with two post-judgment claims for fees and expenses. Cellairis's first claim was a "prevailing party" contract claim. Oddly, this claim was based on the *same* "Franchise Agreements" whose arbitrability and *validity* were in dispute in *Samaca I*. App.30a,33a-34a,52a,67a-72a. Cellairis's procedural *non sequitur* would serve as the basis for Samaca's own 9-15-14 claim in *Samaca III*. App.205a-206a. "[T]o assess fees before the […] agreement is found valid would be to put the cart

[6] The initial judge, not Cellairis, made this disclosure on Nov. 2, 2016 and voluntarily recused on Nov. 3, 2016, five months after suit was filed. App.60a-62a.

before the horse." *De Angelis v. Icon Entm't Grp. Inc.*, 364 F.Supp.3d 787, 798 (S.D. Ohio 2019).

To Samaca's greater confusion, Cellairis's second claim was a Georgia statutory claim for abusive litigation under 9-15-14. Cellairis argued, among other matters not relevant here, that petitioner's challenge to arbitration lacked "any justiciable issue" under 9-15-14(a) or "lacked substantial justification" under 9-15-14(b). App.35a,72a-76a.

Preceding merits defenses showing a *bona fide* dispute regarding the existence of an arbitration agreement,[7] Samaca raised judicial estoppel. The doctrine's "primary purpose […] is […] to protect the integrity of the judiciary [and] to prevent parties from making a mockery of justice through inconsistent pleadings." *Nat. Bldg. Maintenance Specialists v. Hayes*, 653 S.E.2d 772, 774 (Ga. App.

[7] The following cases hold that a conflicting a forum selection clause negates the existence of an arbitration agreement: *Arizon Structures Worldwide, LLC v. Global Blue Techs.-Cameron, LLC,* 481 S.W.3d 542, 548 (Mo. App., 2015); *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.,* 764 F.3d 210, 214 (2d Cir. 2014); *Applied Energetics, Inc. v. NewOak Capital Markets, LLC,* 645 F.3d 522, 525 (2d Cir. 2011); *Hyundai Merch. Marine Co. v. ConGlobal Indus., LLC,* 2016 WL 695649, at *1 (N.D. Tex. Feb. 22, 2016); *PDX Pro Co., Inc. v. Dish Network*, LLC, 2013 WL 3296539, at *3, *4 (D. Colo. July 1, 2013); *Beumer Corp. v. Bloom Lake Iron Ore Mine Ltd*., 2014 WL 2619676 (N.D. Ohio, June 12, 2014); *GKD-USA, Inc. v. Coast Machinery Movers*, 126 F.Supp.3d 553, 556-7 (D. Md., 2015); *Sharpe v. Ameriplan Corp*.,769 F.3d 909, 918 (5th Cir., 2014); *Union Elec. Co. v. Aegis Energy Syndicate 1225*, 713 F.3d 366, 368 (8th Cir., 2013); *Summit Contractors, Inc. v. Legacy Corner, L.L.C.*, 147 F. App'x 798, 802 (10th Cir. 2005); *Bellman v. i3Carbon, LLC*, 563 F. App'x 608 (10th Cir. 2014).

2007). Thus, Samaca contended that an arbitrator must also decide the arbitrability of Cellairis's own claims. App.79a,80-81a,88a-89a.

Despite Samaca's requests, the trial court postponed ruling on Cellairis's claims until the appeal in *Samaca I* was final. App.104a-108a. During the appeal, Cellairis did not claim, and no appellate court even suggested, that Samaca's appeal was frivolous in challenging the existence of an agreement to arbitrate arbitrability.[8] Crucially, proof of such agreement requires "clear and unmistakable evidence." *Henry Schein*, 139 S.Ct. at 530. Although facing the contradictory forum selection clause, no court applied this evidentiary standard. Even so, the affirmance enforcing the "arbitrability questions" delegation provision was not unanimous. One judge concurred "in judgment only." Consequently, under court rule, the decision was a "physical precedent" that solely binds the case.[9] 813 S.E.2d 416, 420. App.18a-19a. Be that as it may, after the Georgia Supreme Court denied certiorari, App.20a-21a, Samaca accepted the result: An arbitrator, not a court, must decide the arbitrability of all claims.

On November 26, 2018, after the remittitur, petitioner filed its own motion to compel arbitration and raised Georgia's law of the case under O.C.G.A. §

---

[8] See Ga. App. Rule 7(e)(2) and Ga. Rule 6 regarding frivolous appeals. App.257a-259a.

[9] See Ga. App. Rule 33.2(a)(1). App.264a-265a.

9-11-60(h).[10] These arguments supplemented judicial estoppel that required enforcement of the delegation provision. App.109a-117a. On January 11, 2019, Samaca filed briefing on *Henry Schein* to stress that only an arbitrator could decide the arbitrability of Cellairis's claims. App.118a,120a-121a.

B. Over Samaca's objections, judge decides arbitrability of Cellairis's claims.

At the hearing on February 12, 2019, Samaca made a continuing objection to the court's ruling upon the arbitrability or merits of Cellairis's claims. App.135a. If a trial court denies a "nonfrivolous" motion for arbitration, the Georgia Supreme Court has given it "firm direction" to defer merits adjudication and to certify the case for interlocutory appeal. *Am. Gen. Fin. Servs. v. Jape*, 732 S.E.2d 746, 751 n. 3, 752 (Ga. 2012) (Nahmias & Blackwell concurring) ("***Jape***"). Samaca also made a continuing objection to and moved to strike any unsworn evidence or statements by counsel. App.136-7a. Cellairis presented no witnesses on fees or other disputed facts.[11] *Id.*122a-149a. Samaca's counsel again cited *Henry Schein*, saying "I don't see any way

---

[10] 9-11-60(h) states in relevant part: "[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be."

[11] Prior to the hearing, Samaca had disputed the fee invoices and putative affidavit of Ronald Coleman who did not attend or testify at the hearing. App. 100a-102a,122a-149a.

around it." App.140a,148a. After the 41-minute hearing, the judge took the matter under advisement. *Id.*148a-149a.

On March 6, 2019,[12] ignoring *Jape* and Samaca's objections, the court entered a final order and decided the arbitrability of both claims. It held that the "prevailing party" contract claim was subject to arbitration, but *on the merits*, not arbitrability.[13] Regarding the 9-15-14 claim, the judge held in relevant part:

> "[A]wards under 9-15-14 are not 'claims' subject to arbitration but rather constitute sanctions of the Court intended to recompense litigants and to punish and deter litigation abuses. *See* Long v. City of Helen, 301 Ga. 120, 121,799 S.E.2d 741, 742 (2017); Riddell v. Riddell, 293 Ga. 249, 250, 744 S.E.2d 793, 794 (2013)." [App.38a.]

After incorrectly stating that the order compelling arbitration in *Samaca I* was "unanimously affirmed," App.33a, the court held that Samaca's arguments on

---

[12] The March 6, 2019 order amended and superseded a prior interlocutory order dated February 27, 2019 by including the amount of the monetary award under 9-15-14(b). App.22a-29a.

[13] The March 6, 2019 order stated:

> The Court therefore finds that Defendants' request for fees under the "prevailing party" provision arises out of or is related to the agreement and thus must be decided by an arbitrator**.** [Emphasis added].

App.34-35a. To the extent that arbitrability was decided on this claim, this ruling is also included for review.

"the narrow issue" of arbitration "lack substantial justification" because the parties' agreements used "clear and unambiguous language." App.36a. It did not mention *Henry Schein* or discuss Samaca's other authorities. It still had not reconciled the forum selection and arbitration clauses. "[F]ederal law places arbitration clauses on equal footing with other contracts, not above them." *Janiga v. Questar Capital Corp.*, 615 F.3d 735 (7th Cir. 2010).[14] Making calculations off the record based on no sworn testimony, the judge awarded $59,983.78 in fees and costs under 9-15-14(b). Refuting the order, App.37a n. 2, the record shows no witnesses testified to be cross-examined, and Samaca had disputed Cellairis's invoices. App.100a-102a,122a-149a. The monetary punishment violated basic Due Process safeguards. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

The record also shows that the judge violated Samaca's Due Process rights by punishing it for appealing her order in *Samaca I*. At the hearing, Judge Bonner said to Cellairis's counsel: "Be careful what you ask for […] [b]ecause […] if I decide in your favor, there is sure to be appeals[…] and I'm just wanting to make sure what your client wants". App.146a. The March 6, 2019 order then said Samaca's "tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years". *Id.*38a. Yet Samaca's suit was only

[14] See fn. 7, *supra*. "[A] court is not authorized to award attorney fees under OCGA § 9-15-14(b) where a ruling on the claim at issue is dependent upon the resolution of a factual or legal dispute." *Lee v. Park*, 800 S.E.2d 29, 33 (Ga. App. 2017).

pending from June 3, 2016 to Feb. 7, 2017 (8 months and four days). And Judge Bonner dismissed the suit only 49 days after it was transferred from the initial judge, whose election campaign treasurer was Cellairis's general counsel. *Id*.1a,51a,60a-62a. Thus, the "tactics" and "almost three years" referred to the *Samaca I* appeal. An award under 9-15-14 may not be imposed for an appeal. *McGahee v. Rodgers*, 632 S.E.2d 657, 661 (Ga. 2006). And Due Process bars a trial court from punishing a party for exercising appellate rights. *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969); *Tollett v. City of Kemah*, 285 F.3d 357, 366 (5th Cir. 2002) (reversing sanctions).

III. *Samaca II: Samaca's application for direct appeal and certiorari are denied.*

On March 11, 2019, Samaca filed an application in the Georgia Court of Appeals under O.C.G.A. § 5-6-35[15] and requested a *direct* appeal under 5-6-35(j). App.153a-184a. In doing so, Samaca used procedure recommended for orders with multiple rulings that implicate both the direct appeal, O.C.G.A. § 5-6-34(a), and "discretionary" appeal, § 5-6-35(a), statutes. The final order denying arbitration fell within 5-6-34(a)(1),[16] while the final 9-15-14 award

[15] The "application in the nature of a petition […,]" 5-6-35(b), "shall be filed with the clerk of the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order[….]" 5-6-35(d). App.251a,253a.

[16] 5-6-34(a)(1) states:

> Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which

fell within 5-6-35(a)(10).[17] When this occurs, recommended procedure is to file an application and rely on 5-6-35(j)[18] for a direct appeal. See *Schumacher v. City of Roswell*, 803 S.E.2d 66, 72-73 (Ga. 2017) (Grant & Nahmias concurring) ("the more efficient path would be to file only an application […] under OCGA § 5-6-35(j)."). In addition to 5-6-35(j), Samaca cited *Jape* for the right to a *full direct appeal*. App.158a. In *Jape*, the Georgia Supreme Court held that parties may not directly appeal from an *interlocutory* order denying enforcement of the FAA. However, this changes when the case is *final*:

> [P]arties who cannot obtain an immediate appeal of the denial of a nonfrivolous motion to

---

> appeals are authorized by the Constitution and laws of this state: (1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35; [App.245a] (pre-May 7, 2019).

[17] 5-6-35(a)(10) covers: "Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14[.]" [App.251a, 253a].

[18] 5-6-35(j) states:

> When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section. [App.251a-254a-255a.]

> compel arbitration *will remain entitled to a direct appeal of the issue when their case is final*, see OCGA § 5-6-34(a)(1), so that the fundamental Congressional objective of enforcing arbitration agreements may still be served.

732 S.E.2d at 752 (Nahmias & Blackwell concurring) (emphasis added). Importantly, the standard of review of an order denying enforcement of an arbitration agreement is *de novo*. *D.S. Ameri Const. Corp. v. Simpson*, 611 S.E.2d 103, 104 (Ga. App. 2005).

Nonetheless, 22 days later, on April 2, 2019, the Georgia Court of Appeals without explanation denied the application as "discretionary."[19] App.39a. A discretionary application is a "quick-look"[20] review under 5-6-35(f)[21] where the relevant appellate court

---

[19] Ga.App.Rule 31 describes 5-6-35 applications as "discretionary." App.259a-264a. Compare *Citizens & Southern Nat. Bank v. Rayle*, 273 S.E.2d 139, 142 (Ga. 1980) ("The clear intent of [5-6-35 as enacted] was to give the appellate courts […] the discretion not to entertain an appeal […]") with *Redmon v. Johnson*, 809 S.E.2d 468, 470 n. 2 (Ga. 2018) (*dicta*) ("While commonly called 'discretionary appeals,' under this [Georgia Supreme] Court's Rule 34(1), if the application in such a case shows that '[r]eversible error appears to exist,' the application 'shall be granted.'"). See Ga.Rule 34, App.258a.

[20] This term is used by undersigned counsel.

[21] 5-6-35(f) states: "The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed." [App.251a, 254a].

may grant a limited right[22] to appeal within 30 days of the application. Yet when a final order is concerned, the appellate court "acts in an error-correcting mode such that a denial of the application is ***on the merits***, and the order denying the application is *res judicata* with respect to the substance of the requested review." *PHF II Buckhead LLC v. Dinku*, 726 S.E.2d 569, 572 (Ga. App. 2012) (emphasis added); *Northwest Social and Civic Club, Inc. v. Franklin*, 583 S.E.2d 858, 859 (Ga. 2003).

Although a straightforward reading of *Jape* shows that Samaca was "entitled to a direct appeal" with *de novo* review to enforce the FAA, the Georgia Supreme Court did not question the Georgia Court of Appeals and denied Samaca's petition for certiorari in *Samaca II*, App.40a-41a,228a,230a-231a.

IV. *Samaca III: Samaca makes 9-15-14 claim against Cellairis; judge decides arbitrability questions over Samaca's objections; Samaca's application for direct appeal and certiorari are denied.*

On March 21, 2019, petitioner filed *Samaca III*, its own 9-15-14 motion against Cellairis. App.205a-207a. The motion pertained to Cellairis's "prevailing party" contract claim that the judge compelled to arbitration in *Samaca II*. App.34a-35a. As shown (*supra,*pp.7-8), Cellairis's contract claim was

---

[22] The appeal is limited because errors may not be added to those in the application, and the court may reduce the errors to be heard. *Zekser v. Zekser*, 744 S.E.2d 698, 700-701 (Ga. 2013).

procedurally illogical because arbitrability and contract validity had not been decided. To be sure, citing the law of the case in *Samaca I* and *Henry Schein*, Samaca objected to the trial court's ruling upon Samaca's ***own*** 9-15-14 claim until an arbitrator decided its arbitrability. App.205a-206a.

Nonetheless, on June 4, 2019 without a hearing, Judge Bonner disregarded petitioner's objection and denied its 9-15-14 motion in *Samaca III*. App.42a-44a.

On July 1, 2019, Samaca filed an application with the Georgia Court of Appeals and again requested a full direct appeal as of right under 5-6-35(j) and *Jape*. App.208a-211a. However, shortly before filing the application, Samaca discovered that Judge Bonner's son, Charles D. Bonner, is a staff attorney for the Georgia Court of Appeals. The court employs "[permanent] staff attorneys who are intimately involved in the opinion writing process."[23]

> [A]n application for a discretionary […] appeal is randomly assigned to a judge by the court's

---

[23] Written by the then Chief Judge Stephen Dillard in "Open Chambers: Demystifying the Inner Workings of the Georgia Court of Appeals," 65 *Mercer Law Review* 831, 856-57 (2014). "Georgia's appellate courts have a practice of hiring permanent staff attorneys, and thus, unlike the federal judiciary, we do not send a wave of law clerks out into the workforce every year with 'insider knowledge.'" *Id*. at 846. In 2018, Georgia Supreme Court reported "staff attorneys who have served here going back to the 1980s." *Redmon*, 809 S. E. 2d at 472 n. 7. In addition, "there really is a familial-like collegiality at the court of appeals." 65 *Mercer Law Review* at 848 n. 60.

> computer-generated "wheel." The application is then immediately and randomly assigned to an attorney in central staff to carefully review the application and accompanying materials, conduct any additional and necessary research (time permitting), and *draft a memorandum on behalf of the assigned judge recommending the grant or denial of the application.* [24]

Hence, concurrently with its July 1, 2019 application, Samaca moved to recuse Mr. Bonner and requested disclosure of his participation in any past appellate proceedings. App.220a-227a. However, 22 days later, on July 23, 2019, the Georgia Court of Appeals again used "quick-look" review. The court without explanation denied Samaca's application as "discretionary." App.45a. It also denied a motion for reconsideration and refused to disclose whether Judge Bonner's son participated in any appellate proceedings.[25] *Id.*46a-48a. The Georgia Supreme Court denied certiorari. *Id.*49a,50a; 237a-244a.

---

[24] *Id.* at 854-855. (Emphasis added).

[25] While stating that "judges ensure that staff members 'observe the standards of fidelity and diligence that apply to the judges'[…]," the anonymous order said: "There is, however, no requirement that any such disqualification be disclosed on the record." App.46a-47a. Petitioner respectfully disagrees. Canon 2, Rule 2.11, Comment [2] of the Georgia Code of Judicial Conduct, says:

> Judges should disclose on the record, or in open court, information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification. [App.266a.]

REASONS FOR GRANTING THE PETITION

Georgia cannot exempt 9-15-14 from arbitration under the FAA.

This case presents open defiance of federal law where summary reversal may be appropriate. There is no "sanctions-claims" dichotomy under Georgia law to exempt this controversy from arbitration under the FAA. Before the March 6, 2019 order, the parties had not briefed *Long* or *Riddell* cited by Judge Bonner. App.38a. These cases do not, and could not, exempt 9-15-14 from arbitration under the FAA on the premise that no "claims" are involved. To the contrary, *Long* states that "the origins of OCGA § 9-15-14 […] arose out of torts of malicious use and malicious abuse of the judicial process." *Id*., 799 S.E.2d at 742 n. 2.[26] In other words, 9-15-14 is a codification of a state-law tort claim. To be sure, 9-15-14 is an explicit part of Georgia's "exclusive remedy" abusive litigation regime codified in O.C.G.A. §§ 51-7-80 to 51-7-85.

O.C.G.A. § 51-7-83(b) states:

> If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are ***claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead***. [Emphasis added].

---

[26] *Riddell,* 744 S.E.2d at 794 did not say or imply that 9-15-14 is not a "claim" exempt from FAA arbitration.

In turn, O.C.G.A. § 51-7-85 states:

> On and after April 3, 1989, no ***claim*** other than as provided in this article ***or in Code Section 9-15-14*** shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that ***claims*** filed prior to such date shall not be affected. This article is the ***exclusive remedy*** for abusive litigation. [Emphasis added].

Thus, Georgia statutory law provides that a 9-15-14 motion is a "claim." The Justices and Judges of Georgia's appellate courts have also described 9-15-14 motions as a "claim." See *Glass Sys. Inc. v. Ga. Power Co.*, 703 S.E.2d 605, 606 (Ga. 2010) (referring to "an OCGA § 9-15-14 claim."); *Freeman v. Wheeler*, 627 S.E.2d 86, 89 (Ga. App. 2006) (referring to "prior OCGA § 9-15-14 claim").

Even Cellairis described its motion at the hearing as "our 9-15-14 claim" and "the 9-15-14 claim." To remove doubt, Cellairis said: "9-15-14 […] is, of course, a statutory claim." App.132a,145a-146a.

Also, the ordinary meaning of "claim" is not confined to a legal action. The *Merriam-Webster Collegiate Dictionary* (10th Ed. 1997) includes "an assertion open to challenge." Echoing this usage, *Black's Law Dictionary* (6th Ed. 1990) includes "to assert, to urge, to insist." This meaning of "claim" is consistent with the FAA's term: "controversy." See 9

U.S.C. § 2 ("A written provision […] to settle by arbitration a controversy […] shall be valid".) A "controversy" is also a "dispute." *Merriam-Webster*. This Court has used "controversy," "claim," and "dispute" interchangeably when enforcing the FAA. *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) ("controversy"); *AT&T*, 563 U.S. at 341 ("claim") and *Henry Schein*, 139 S.Ct. at 529 ("dispute"). Also, because the arbitration provision covers "all controversies, claims, or disputes" and the delegation provision applies to "arbitrability questions," App.2a-3a, the principles of *ejusdem generis* and *noscitur a sociis* require that "claim" have a meaning similar to "controversy," "dispute," or "question."

At any rate, controversies that may result in court-imposed penalties are arbitrable under the FAA. *See Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (Sherman Act antitrust penalties under 15 U.S.C. §§ 1 & 15 are arbitrable). This accords with construing "any doubts concerning the scope of arbitrable issues […] in favor of arbitration." *Id*. at 626. In this vein, even when state law *prohibits* arbitrators, but not courts, from awarding punitive damages, these damages are still arbitrable under the FAA. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 64 (1995). And showing no special exemption under the FAA for sanctions, *Henry Schein* recognized that "arbitrators may […] impos[e] fee-shifting and cost-shifting sanctions." *Id*. 139 S.Ct. at 531.

In short, both 9-15-14 motions in *Samaca II* and *III* concern "claims" for purposes of the FAA. "When

state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T*, 563 U.S. at 341. Furthermore, the 9-15-14 motions concern "controversies, claims, or disputes" under the "arbitrability questions" delegation provision in this case. App.2a-3a.

> "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein*, 139 S.Ct. at 529.

The trial court provided the only known reason for not implementing the FAA. Cf. *Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale."). Yet the judge's reason conflicts with this Court's rulings, and the judge lacked power to even decide whether 9-15-14 is arbitrable.

At the appellate level, the Georgia Court of Appeals gave no reason at all. In anonymous orders that did not disclose whether the trial judge's son participated in the decisions, this appellate court used 22 days of "quick-look" review to deny Samaca's applications as "discretionary" ***on the merits***. However, in enforcing arbitration agreements, "the [FAA] leaves no place for the exercise of discretion

[….]" *Dean Witter*, 470 U.S. at 218. The Supremacy Clause binds "the Judges in every State," U.S. Const., Art. VI, cl. 2, and does not distinguish between trial and appellate judges. "[A] federal right cannot be defeated by the forms of local practice." *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949). And the outcome of a federal right cannot depend upon whether a case is filed in state or federal court. See *Johnson v. Fankell*, 520 U.S. 911, 921 (1997) (federal immunity defense is fully enforceable in state court appeal after final judgment.)

The Georgia Supreme Court's non-merits denials of certiorari are also highly concerning. That court had said that, when a case is final, a party is "entitled to a direct appeal" from an order denying enforcement of an arbitration agreement under the FAA. *Jape*, 732 S.E.2d at 752. In our case, however, it turned a blind eye to the Georgia Court of Appeals' "quick-look" "discretionary" review on the merits. This undercuts the FAA's mandate "to ensure judicial enforcement of […] agreements to arbitrate." *Dean Witter*, 470 U.S. at 218.

> "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act […],including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 18 (2012) (per curiam).

By allowing *Samaca II* and *III* to stand, Georgia courts effectuated a special dispensation of 9-15-14 from the FAA. This they may not do. And the *way* this was done is just as troubling. The law must be enforced with due process and applied equally to Cellairis and Samaca. U.S. Const., amend XIV, § 1. Here, Georgia courts selectively defied clearly established law. Just as all other statutory claims in this case, the parties' 9-15-14 claims are subject to arbitration under the FAA. Moreover, only an arbitrator, not a court, may decide their arbitrability in this case. Presenting purely legal questions, this petition is fit for vindicating the supremacy of federal law and the authority of this Court.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari. In the alternative, the Court should summarily reverse the two decisions below.

Respectfully submitted,
March 2020.

David R. Martin
D.R. Martin, LLC
5200 Peachtree Rd.
Suite 3116
Atlanta, Georgia 30341
Tel. 770-454-1999
Email: dmartin@abogar.com
Petitioner's counsel